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No. 01-595

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANGELA RUIZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain material exculpatory information, including impeachment information, from the prosecution.

2. If so, whether that right may be waived through a plea agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 241 F.3d 1157.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2001. A petition for rehearing was denied on June 11, 2001 (Pet. App. 40a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, RULES, AND STATUTE INVOLVED

The Due Process Clause of the Fifth Amendment provides in pertinent part that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." The relevant portions of Rules 11 and 16 of the Federal Rules of Criminal Procedure and of the Jencks Act, 18 U.S.C. 3500, are set forth in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

Following a plea of guilty, respondent was convicted in the United States District Court for the Southern District of California on one count of importing marijuana, in violation of 21 U.S.C. 952 and 960. J.A. 7. Respondent was sentenced to 18 months' imprisonment, to be followed by three years of supervised release. J.A. 2. The court of appeals vacated respondent's sentence and remanded for resentencing. Pet. App. 21a.

1. On August 13, 1999, respondent entered the United States from Mexico through the port of entry at Tecate, California. J.A. 25. A search of respondent's car uncovered approximately 30.1 kilograms of marijuana concealed within it. *Ibid.* Respondent was arrested and transported to the Metropolitan Correctional Center. Pet. App. 1a.

The United States Attorney for the Southern District of California offered respondent an opportunity to enter into a "fast-track" plea agreement. Pet. App. 1a-2a. Under the Southern District of California's standard fast-track agreement, a defendant agrees to waive indictment, plead guilty to an information, and waive appellate rights. J.A. 9-10, 17-18. In addition, the standard fast-track agreement contains a provision in which the government represents that it has provided the defendant with any information in its possession that establishes the defendant's factual innocence, and the defendant waives the right to receive any information that would impeach government witnesses or support an affirmative defense. J.A. 12; Pet. App. 45a-46a. The waiver provision of the agreement specifically

states that:

> The Government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The Government understands it has a continuing duty to provide such information establishing the factual innocence of the defendant.
>
> The defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. In return for the Government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.

Ibid. In return for the defendant's commitments, the government agrees to recommend a two-level downward departure from the offense level specified by the Sentencing Guidelines. *Ibid.*

Respondent declined the U.S. Attorney's offer to enter into a plea agreement. Pet. App. 2a.

2. A federal grand jury subsequently returned a two-count indictment charging respondent with importing marijuana, in violation of 21 U.S.C. 952 and 960, and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). J.A. 7-8. Respondent pleaded guilty to the count charging her with importing marijuana. J.A. 25. At the hearing on her guilty plea,

respondent stated that she understood the charge to which she was pleading guilty and the maximum penalty she faced. J.A. 24. She further stated that she was satisfied with her attorney's services. J.A. 25. After her attorney described her criminal conduct, respondent admitted that she knowingly drove a car containing approximately 30.1 kilograms of marijuana across the border. J.A. 25-26.

The Presentence Investigation Report determined that respondent's total offense level was 13 and that her criminal history category was III, yielding a Guidelines sentencing range of 18-24 months' imprisonment. See Pet. App. 43a. Respondent sought a "fast-track" downward departure, asserting that she had done everything to qualify for such a departure except waive the right to receive information that would impeach government witnesses and support an affirmative defense. *Id.* at 41a-43a. She further argued that she had a constitutional right to receive such information under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972), and that the government had acted unconstitutionally in attempting to secure a waiver of that right. Pet. App. 42a-43a. The government opposed a fast-track departure, on the ground that it had not received the benefits that accompany fast-track agreements. *Id.* at 42a. The district court refused to grant a downward departure and sentenced respondent to 18 months' imprisonment. *Id.* at 43a-44a.

3. A divided panel of the Ninth Circuit reversed and remanded for resentencing. Pet. App. 1a-39a. As relevant here, the court held that a criminal defendant has a constitutional right to obtain material exculpatory information before pleading guilty and that a defendant

may not validly waive that right through a plea agreement. *Id.* at 8a-16a.

The court of appeals first reaffirmed its holding in *Sanchez* v. *United States*, 50 F.3d 1448, 1453 (1995), that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material [exculpatory] information withheld by the prosecution." Pet. App. 9a. The court also reaffirmed *Sanchez*'s rationale—that "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Id.* at 9a-10a.

The court of appeals next concluded that "[t]he rationale of *Sanchez* applies with equal force to plea agreements." Pet. App. 10a. The court reasoned that "[t]he disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a guilty plea." *Ibid.* The court therefore concluded that "plea agreements, and any waiver of *Brady* rights contained therein, 'cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution.'" *Ibid.* The court rejected the government's argument that a waiver is valid if limited to impeachment material bearing on the credibility of government witnesses. *Id.* at 13a-15a. Noting that this Court had rejected any distinction between impeachment material and other exculpatory material under *Brady*, *id.* at 14a-15a, the court held that information favorable to the defense must be disclosed whenever it would create "a reasonable probability that but for the failure to disclose the *Brady* material the defendant would have refused to plead and would have gone to trial." *Id.* at 15a.

Based on its holding that a waiver of *Brady* rights is invalid, the court of appeals further held that "it is unconstitutional for prosecutors to withhold a departure recommendation based on a defendant's refusal to accept such a waiver." Pet. App. 18a. The court also concluded that respondent had made a sufficient showing to warrant an evidentiary hearing on whether "the Government declined to recommend a 'fast track' departure because [respondent] refused to waive her *Brady* rights." *Id.* at 19a. The court remanded with directions to the district court to conduct such a hearing, and to determine in its discretion whether to remedy any violation it found. *Id.* at 20a-21a.

Judge Tallman dissented. Pet. App. 25a-39a. He concluded that the majority's rule "forces the government to turn over information to a defendant immediately upon beginning plea bargain negotiations, when that information will generally be of little use to the defendant unless she goes to trial." *Id.* at 38a. Judge Tallman also concluded that the majority's rule interferes with the government's substantial interest in "maintaining the confidentiality of government witnesses and protecting ongoing investigations." *Ibid.* Judge Tallman emphasized that the majority's rule prevents the expeditious resolution of drug courier cases because it requires prosecutors to engage in "the often time-consuming process of determining which witnesses it may call at trial, what potential impeachment information on each witness is in its possession, and whether it must disclose that information to the defendant." *Id.* at 39a.

SUMMARY OF ARGUMENT

I. A criminal defendant does not have a constitutional right to obtain material exculpatory information

from the government before pleading guilty. The rule announced in *Brady* v. *Maryland*, 373 U.S. 83 (1963), establishes that a prosecutor has a duty to disclose material exculpatory information to a defendant in order to protect the fairness of a verdict at trial, and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. Those purposes are not implicated when a defendant pleads guilty and waives his right to a trial. Except in the most unusual circumstances, a defendant who is assisted by competent counsel knows whether he has committed the charged offense. If such a defendant pleads guilty, there is no reason to question the reliability of the plea. As this Court has explained, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis deleted).

Nor must a defendant have access to the prosecution's files in order to enter a voluntary and intelligent plea. When a defendant pleads guilty, he is not admitting that the government's evidence establishes his guilt beyond a reasonable doubt. He admits that "he actually committed the crimes," and that "he is pleading guilty *because he is guilty*" (emphasis added). *United States* v. *Hyde*, 520 U.S. 670, 676 (1997). A defendant does not need to know the strength of the government's case in order to make those admissions intelligently and voluntarily.

In *Brady* v. *United States*, 397 U.S. 742, 757 (1970), the Court specifically explained that there is "no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open

court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." Similarly, in *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970), the Court emphasized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case."

Requiring the prosecution to provide material exculpatory information to a defendant pleading guilty would impose serious costs on the criminal justice system. It would endanger prospective government witnesses and the conduct of ongoing investigations; transform *Brady* v. *Maryland* from a fair trial right into a trial preparation right; hamper the expeditious resolution of criminal cases through guilty pleas; intrude on the strong interest in the finality of criminal convictions; and deter the government from offering plea bargains that would benefit both the defendant and the government. The existence of those serious costs to the administration of justice further undermines the claimed due process right at issue here.

II. Even if *Brady* v. *Maryland*'s due process rule were extended to the guilty plea stage of a criminal proceeding, a defendant pleading guilty could validly waive the right to obtain material exculpatory information in a plea agreement. This Court's decisions establish that a criminal defendant may waive many of the most fundamental constitutional protections, including the privilege against compulsory self-incrimination, the

right to a jury trial, the right to confront one's accusers, and the right to counsel. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). If there were a due process right to obtain material exculpatory information before pleading guilty, that right should be equally waivable. If a defendant assisted by competent counsel decides to plead guilty and is willing to waive his right to obtain whatever material exculpatory information there happens to be in exchange for the possibility of a reduced sentence or other considerations, no sound constitutional basis exists to prevent him from doing so.

ARGUMENT

RESPONDENT'S RIGHTS WERE NOT VIOLATED BY THE GOVERNMENT'S REFUSAL TO RECOMMEND A DOWNWARD DEPARTURE AFTER HER REJECTION OF THE PLEA AGREEMENT

The court of appeals held that respondent had a constitutional claim that the government may have impermissibly withheld a recommendation for a downward departure at sentencing because of respondent's refusal "to waive her *Brady* rights" in a proposed plea agreement. Pet. App. 21a. That holding is incorrect. The court of appeals recognized that "to prevail on her downward departure claim, [respondent] must show that the *Brady* waiver contained in the rejected plea agreement is unconstitutional." *Id.* at 7a. No such showing can be made. Respondent had no right to *Brady* material in the first place before pleading guilty. In any event, any such right could validly be waived.

I. A CRIMINAL DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO OBTAIN MATERIAL EXCULPATORY INFORMATION FROM THE PROSECUTION BEFORE PLEADING GUILTY

A. A Defendant Does Not Have A Constitutional Right Under *Brady* v. *Maryland* To Obtain Material Exculpatory Information From The Prosecution Before Pleading Guilty

The Ninth Circuit's holding that a criminal defendant has a constitutional right to obtain material exculpatory information from the prosecution before pleading guilty is unsupported by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the decisions applying it. Under those decisions, a prosecutor's duty to disclose exculpatory information arises only where disclosure is necessary to ensure a fair trial on the issues of guilt or punishment. *Brady* does not require the prosecution to disclose information in its files in order to help a criminal defendant make a strategic decision about whether to plead guilty.

In *Brady*, this Court granted a criminal defendant a new sentencing hearing because the prosecutor had withheld evidence of a co-defendant's confession. The Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The principle supporting that holding, the Court explained, is "avoidance of an unfair trial to the accused." *Ibid.*

In *Giglio* v. *United States*, 405 U.S. 150 (1972), the Court extended *Brady* to impeachment evidence, holding that the prosecution violated due process when it

failed to disclose that it had promised its key witness that he would not be prosecuted if he testified at the defendant's trial. The Court reasoned that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." *Id.* at 154.

In subsequent cases, the Court has consistently limited *Brady* to the nondisclosure of exculpatory information that results in the denial of a fair trial by undermining confidence in the reliability of the jury's finding of guilt (or of the resulting sentence). In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court emphasized as "a critical point" that "the prosecutor will not have violated his constitutional duty of disclosure [under *Brady*] unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 108. The Court further explained that, because "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," a prosecutor's failure to disclose exculpatory evidence violates the Constitution only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 112. The Court rejected as inconsistent with *Brady* a standard that would instead "focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial." *Id.* at 112 n.20.

Similarly, in *United States* v. *Bagley*, 473 U.S. 667, 675 (1985), the Court explained that the purpose of the *Brady* rule "is not to displace the adversary system," but to "ensure that a miscarriage of justice does not occur." For that reason, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Ibid.* (footnote omitted). Any broader right, the Court

observed, "would entirely alter the character and balance of our present systems of criminal justice." *Id.* at 675 n.7. The Court reiterated that "[c]onsistent with our overriding concern with the justice of the finding of guilt, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678 (citation and internal quotation marks omitted).

More recently, in *Kyles* v. *Whitley*, 514 U.S. 419, 436-437 (1995), the Court explained that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." A constitutional violation occurs only "when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* at 434. And in *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), the Court observed that, while the phrase "*Brady* violation" is sometimes used loosely to refer to the breach of a broad obligation to disclose exculpatory evidence, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."

The purpose of the Court's *Brady* decisions is therefore to protect the fairness of the trial and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. That purpose is not implicated when a defendant enters a plea in open court, thereby "admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). As the Fifth Circuit has explained, "*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads

guilty." *Orman* v. *Cain*, 228 F.3d 616, 617 (5th Cir. 2000) (per curiam); see also *Matthew* v. *Johnson*, 201 F.3d 353, 360, 361-362 (5th Cir.), cert. denied, 531 U.S. 830 (2000).

When a defendant pleads guilty, there is no serious risk that an innocent person will be convicted because the prosecution did not disclose exculpatory evidence. Barring unusual circumstances, a defendant who has the assistance of competent counsel will know whether he is guilty of the charged offense. Once such a defendant solemnly swears in open court that he has committed the offense, there is no reason to question the accuracy of the resulting entry of a finding of guilt. As this Court has explained, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis deleted); see also *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are * * * unlikely to be driven to false self-condemnation.").

Neither *Brady* nor its underlying rationale supports the creation of a new constitutional rule that would require the prosecution to disclose to every criminal defendant contemplating a plea of guilty all material exculpatory information in the prosecution's possession. Disclosure of such material at the guilty plea stage is

not necessary to protect a defendant's right to a fair trial or to ensure the reliability of a finding of guilt.[1]

B. A Defendant May Enter An Intelligent And Voluntary Plea Without Receiving Material Exculpatory Information From The Prosecution

The Ninth Circuit made no attempt to justify its disclosure rule by reference to *Brady* v. *Maryland* or its underlying rationale. Instead, it attempted to link its holding to a separate constitutional principle—that the Due Process Clause requires that a defendant's decision to plead guilty be intelligent and voluntary. The court reasoned that "guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material [exculpatory] information withheld by the prosecution." Pet. App. 9a. The court did not suggest that knowledge of material exculpatory information is

[1] In rare cases, a defendant may be unable to determine whether he is guilty of the charged offense because a fact that is crucial to guilt is outside his knowledge (*i.e.*, the insurance element in a federal bank robbery case) and the defendant, even with the assistance of competent counsel and discovery under Federal Rule of Criminal Procedure 16, cannot discover it through reasonable investigation. Such a defendant, of course, is free to go to trial to compel the government to prove its case. Cf. *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977) ("[T]here is no constitutional right to plea bargain * * * . It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty."). Alternatively, the defendant may tender a plea in order to obtain any advantages flowing from that course of action. Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970) (discussed at note 2, *infra*). The existence of those rare cases thus cannot justify a constitutional rule requiring disclosure of material exculpatory information to *all* defendants contemplating a guilty plea; normally, a defendant can readily determine his guilt. In any event, this is not one of those rare cases: respondent could readily determine from her own knowledge that she was guilty of the charged offense of importing marijuana.

necessary for a defendant to know whether he has committed the charged offense. Instead, the court viewed receipt of exculpatory information as a component of an intelligent and voluntary plea only because such information could assist a defendant in making a strategic decision whether to plead guilty or go to trial. The court explained the rationale for its rule as follows: "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." Pet. App. 9a-10a. That test led the court to define materiality by reference to whether the information is reasonably likely to lead a defendant to reject a plea and go to trial. *Id.* at 15a.

But knowledge of the government's evidence (or its weaknesses) has never been a prerequisite to a voluntary and intelligent plea. The inquiry into whether a plea is voluntary and intelligent turns on whether the defendant is competent, acts without coercion, and is aware of the charges and the direct consequences of the plea. When the defendant has not waived the right to counsel, the intelligence of the plea also turns on whether the defendant received effective assistance of counsel. Nothing more is required. Thus, even if the receipt of information from the government might improve the defendant's calculations of the odds of acquittal at trial, it does not mean that a guilty plea entered without such information is involuntary or unintelligent.

1. When a defendant admits that he is guilty in open court, he does not admit that the government will be able to prove his guilt to a jury beyond a reasonable doubt. He admits that "he actually committed the crimes," and that "he is pleading guilty *because he is guilty*" (emphasis added). *United States* v. *Hyde*, 520 U.S. 670, 677 (1997). A defendant does not need to

know of potential weaknesses in the government's case in order to make those admissions voluntarily and intelligently.[2]

In *Brady* v. *United States*, 397 U.S. 742 (1970), the Court upheld a guilty plea against the claim that, but for an unconstitutional death penalty scheme under which a defendant was exposed to the death penalty only if a jury so recommended, the defendant would not have pleaded guilty. *Id.* at 745-746, 747; see *United States* v. *Jackson*, 390 U.S. 570 (1968). Even assuming that the penalty provision was a "cause" of the plea, 397 U.S. at 750, the Court upheld the plea under the traditional test that a guilty plea is valid if it is "both 'voluntary' and 'intelligent.'" *Id.* at 747. The Court held that a plea is voluntary if it is not "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or

[2] Normally, a defendant's plea entails an acknowledgment of factual guilt whether or not the defendant explicitly admits committing the charged acts. *North Carolina* v. *Alford*, 400 U.S. 25, 32 (1970) (a guilty plea "subsumes" such an admission "even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment"). In an unusual case, a defendant may enter a plea of guilty while maintaining his innocence, as occurred in *Alford*. But *Alford* upheld the trial court's acceptance of such a plea because the "record before the judge contain[ed] strong evidence of actual guilt." *Id.* at 37; *ibid.* (noting "overwhelming evidence" of guilt); *id.* at 38 (noting the "strong factual basis for the plea demonstrated by the State"). *Alford* thus protected against the plea-based conviction of an actually innocent defendant by requiring a strong showing of factual guilt. There is no general constitutional requirement of such a showing as a prerequisite to a plea, because the plea itself represents an admission that the defendant committed the acts charged in the indictment. Cf. Fed. R. Crim. P. 11(f).

unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (*e.g.* bribes)." *Id.* at 755 (internal quotation marks omitted). The Court held that a plea is intelligent when a defendant is "advised by competent counsel," is "aware of the nature of the charge against him" and the "likely consequences" of the plea, and is not "incompetent or otherwise not in control of his mental faculties." *Id.* at 776; *id.* at 748; *id.* at 756. The Court did not include awareness of exculpatory information possessed by the prosecution as an element of a voluntary and intelligent plea.

While the Court recognized in *Brady* v. *United States* that a defendant's entry of a guilty plea often is influenced by the defendant's view of the strength of the prosecution's case, 397 U.S. at 756, the Court went on to *reject* the contention that a defendant must be able to assess accurately the strength of the prosecution's case in order to make a voluntary and intelligent plea. The Court stated that "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.* at 757. In particular, the Court explained, "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case." *Ibid.* "We find no requirement in the Constitution," the Court stated, "that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought." *Ibid.*

The facts of *Brady* underscore that accurate information about weaknesses in "the prosecution's case" is not a prerequisite to an intelligent plea. 397 U.S. at 757. The defendant in *Brady* pleaded guilty believing that he would face the death penalty if he went to trial, but this Court later invalidated the applicable death penalty provision in *United States* v. *Jackson*, *supra*. 397 U.S. at 756. Even though the defendant had an incorrect understanding of his penalty exposure when he decided to plead guilty, this Court found that his plea was still an "intelligent" one under the constitutional test. *Id.* at 756-757.

Likewise, in *McMann* v. *Richardson*, 397 U.S. 759, 769-770 (1970), the Court upheld the validity of a plea against a claim that it was induced by a defendant's mistaken belief that a confession he made could have been introduced into evidence against him. The Court explained that "a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770. Instead, "[w]hether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends * * * on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 770-771. The Court emphasized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," and that "[i]n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case." *Id.* at 769.

In *Bousley* v. *United States*, 523 U.S. 614, 617 (1998), the Court reaffirmed the principles established in

Brady v. *United States* and *McMann*. In that case, the Court held that a guilty plea is not intelligent if a defendant is incorrectly informed about the essential nature of the charges against him. *Id.* at 619. The Court specifically distinguished *Brady* v. *United States* and *McMann*, on the ground that the defendants in those cases had been correctly informed about the nature of the charges against them, and had attacked their pleas solely on the ground that they had "misjudged the strength of the Government's case or the penalties to which they were subject." *Ibid.*

Other decisions of this Court establish that guilty pleas may be intelligent and voluntary even when the defendant lacks knowledge at the time of the plea that he might have a valid defense to the charges against him. In *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), the Court held that a defendant who received effective assistance from counsel could not attack his guilty plea on the ground that he was unaware at the time of the plea that his grand jury had been unconstitutionally selected. Similarly in *United States* v. *Broce*, 488 U.S. 563, 573 (1989), the Court held that because "conscious waiver" is not required "with respect to each potential defense relinquished by a plea of guilty," a defendant who received effective assistance from counsel could not challenge his guilty plea on the ground that he was unaware when he pleaded guilty that he might have a valid double jeopardy defense.

Thus, under this Court's cases, a plea is intelligent and voluntary as long as the defendant (1) has been advised by competent counsel, (2) is aware of the essential nature of the charge and likely consequences of the plea, (3) is in control of his mental faculties, and (4) is not induced to plead guilty by threats, misrepresentation, or improper promises. *Brady*, 397 U.S. at 749-757;

McMann, 397 U.S. at 770. A defendant does not need to know the strengths or weaknesses of the prosecution's case or how he might attack it in order to make a voluntary and intelligent plea.

2. The criminal justice system has sufficient protections in place to prevent the entry of constitutionally invalid pleas without a rule requiring the government to disclose exculpatory evidence. In order to accept a guilty plea, a trial court must make an adequate record that the plea is made voluntarily and intelligently. *Boykin* v. *Alabama*, 395 U.S. 238, 244 (1969). The defendant's right to the effective assistance of counsel in felony cases stands as a further central protection against unintelligent pleas.

In the federal system, Federal Rule of Criminal Procedure 11 establishes additional procedures to ensure that a guilty plea is intelligent and voluntary. See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). Rule 11 requires a district court to inform the defendant, and determine that the defendant understands, *inter alia*, (1) the nature of the charge and the minimum and maximum penalties he faces, (2) his right to the assistance of counsel, (3) his right to be tried by a jury, (4) his right at that trial to confront and cross-examine witnesses, and (5) his right against compelled self-incrimination. Fed. R. Crim. P. 11(c). Rule 11 also requires the court to address the defendant personally in open court and to determine that the plea is not the result of force or threats, or of promises other than those contained in a plea agreement. Fed. R. Crim. P. 11(d). Finally, Rule 11 requires the court to find that there is a factual basis for the plea. Fed. R. Crim. P. 11(f). After a defendant who has been advised in accordance with Rule 11 "has sworn in open court that he actually committed the crimes, after he has stated

that he is pleading guilty because he is guilty, [and] after the court has found a factual basis for the plea," *Hyde*, 520 U.S. at 676, there is sufficient assurance that a plea is intelligent and voluntary. At that point, the district court "may, in its discretion, accept a defendant's guilty plea." *Id.* at 674. There is no constitutional basis for supplementing Rule 11's carefully crafted procedures for accepting a plea with a new rule that a plea may not be accepted unless the prosecution has first disclosed to the defendant all material exculpatory information in its possession.

3. The Ninth Circuit's reliance on a defendant's interest in knowing the strength of the prosecution's case before pleading guilty is subject to a further fatal objection. If an understanding of the strength of the government's case were truly necessary in order to permit a defendant to make a voluntary and intelligent plea, disclosure of exculpatory information alone could not achieve that objective. A full understanding of the strength of the government's case can only be achieved through a disclosure of evidence that *inculpates* the defendant as well. The logic of the Ninth Circuit's ruling would therefore require the government to disclose inculpatory as well as exculpatory evidence.

This Court, however, has emphatically rejected the proposition that the Due Process Clause requires the prosecution to disclose inculpatory evidence to the defendant. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977); *Agurs*, 427 U.S. at 111 ("we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel"). Indeed, for precisely that reason, the Court in *Agurs* rejected the contention that materiality should be defined by the impact of undisclosed evidence on a defendant's ability to prepare for trial. The Court

explained that a trial preparation standard "would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense." *Id.* at 112 n.20. The Ninth Circuit's decision in this case suffers from the same flaw.

4. Nothing in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), supports the conclusion that the government's disclosure of material exculpatory information is necessary to ensure an intelligent and voluntary plea. In *Hill*, the Court held that a defendant may attack the validity of a guilty plea based on the ineffectiveness of counsel if he can show that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases," *id.* at 56, and that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *id.* at 59. While *Hill* permits a defendant to attack a guilty plea as unintelligent and involuntary if a defendant can show that defense counsel failed to uncover exculpatory evidence that would have caused him to go to trial, that does not imply that the government has an obligation to disclose such evidence.

Hill is based on the Sixth Amendment's specific command that "[i]n all criminal prosecutions, the accused shall * * * have the assistance of counsel for his defence." The Court has interpreted that specific guarantee to encompass "effective" assistance from counsel, because effective assistance from counsel is "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). In an adversarial system, counsel's duty to provide effective assistance necessarily includes a duty to assist the defendant in making strategic decisions, including whether it is in the defendant's interest to

plead guilty or to go to trial instead. *Hill*, 474 U.S. at 56-57; *Tollett*, 411 U.S. at 267-268; *McMann*, 397 U.S. at 771.

In contrast, neither the Sixth Amendment nor any other constitutional provision commands that a defendant shall have a right to effective assistance from the prosecution. Nor does any provision of the Constitution require the prosecution to assist a defendant in making strategic choices. That function falls to defense counsel.

Hill itself demonstrates that the prosecution's constitutional obligations to a defendant contemplating a guilty plea do not parallel those of defense counsel. In that case, the Court held that a plea could not be deemed unintelligent or involuntary simply because the *prosecution* did not furnish to the defendant information about his parole eligibility date. 474 U.S. at 56. In contrast, the Court held that a criminal defendant would be entitled to relief from his plea if he could show that *defense counsel*'s failure to inform him accurately about his parole eligibility fell below an objective standard of reasonableness and that it is reasonably likely that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at 56-59. That contrast illustrates the unique responsibility of defense counsel in the adversary system, a duty that the prosecutor does not share. See *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion) ("[A]n accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. * * * The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be.").

There is, in sum, no duty arising from the Due Process Clause for the prosecution to assist the accused in making strategic choices, by providing the accused with a flow of information about the evidentiary strengths and weakness of the prosecution's case. The imposition of any such duty would effectively "displace the adversary system," and "would entirely alter the character and balance of our present systems of criminal justice." *United States* v. *Bagley*, 473 U.S. 667, 675 & n.7 (1985).

C. Requiring The Prosecution To Disclose Material Exculpatory Information To All Defendants Before They Plead Guilty Would Impose Serious Costs On the Criminal Justice System

This Court has observed that plea bargaining is "an essential component of the administration of justice." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). The Court has also observed that "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Ibid.* Those observations remain true today. Approximately 95% of federal convictions are obtained by guilty plea, and approximately 85% of all criminal defendants in the federal system have their cases resolved through guilty pleas. *Judicial Business of the United States Courts, Annual Report of the Director*, Table D-4 (2000) (available at:*http://www.uscourts.gov/judbus2000/contents.html*).

The Ninth Circuit's rule would fundamentally alter the plea bargaining process and impose a number of serious costs on the criminal justice system. Those serious costs further undermine the court of appeals' due process holding. *Ake* v. *Oklahoma*, 470 U.S. 68, 77

(1985) (Due Process Clause requires a consideration of the extent to which a new requirement would impose costs on the government); *United States* v. *Raddatz*, 447 U.S. 667, 677 (1980) (same).

1. Apart from a duty to comply with discovery orders, the general practice of federal prosecutors is not to disclose to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses. Consistent with that practice, government prosecutors ordinarily do not disclose to a defendant pleading guilty information that could be used to impeach potential government witnesses. The government's desire to protect the identities of cooperating informants, undercover investigators, and other prospective witnesses is based on a well grounded fear that disclosure of such information could disrupt ongoing investigations, and expose prospective witnesses to harassment, intimidation, serious injury, or even death.

Experience demonstrates the validity of that concern. Between 1994 and 2000, the government obtained convictions of at least 467 persons for tampering with, or retaliating against, government witnesses, victims, or informants.[3] Such obstructions of justice are a particular problem in the federal system, because, as the then-Assistant Attorney General for the

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[3] That information is drawn from data provided by the Administrative Office of the U.S. Courts. The figure in the text reflects convictions under 18 U.S.C. 1512 (witness tampering) and 1513 (retaliation), in which those statues represent the lead offense. The total number of convictions under those provisions is likely greater. In addition, witness tampering may be prosecuted under other provisions, such as the omnibus obstruction of justice statute, 18 U.S.C. 1503, or may be taken into account by an increase in a defendant's Sentencing Guidelines range.

Criminal Division explained, federal prosecutors often pursue crimes "in which witness tampering is part of the criminal culture, such as narcotics trafficking, political corruption and large-scale organized crime." See Edward S.G. Dennis, Jr., *The Discovery Process In Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 Wash. U.L.Q. 63, 68 (1990). Under the Ninth Circuit's rule, however, a defendant has the right to obtain, well before trial, impeachment information that in many circumstances could reveal the identities of prospective government witnesses and thereby expose them to tampering efforts, intimidation, or worse.

Federal law and this Court's decisions provide compelling support for the government's standard practice of protecting the identities of prospective witnesses until trial. Congress has required the government to disclose its list of witnesses before trial only in capital cases. See 18 U.S.C. 3432. Moreover, the Jencks Act protects the government's right to withhold statements made by confidential sources and other prospective government witnesses "until said witness has testified on direct examination in the trial of the case." 18 U.S.C. 3500. See also Fed. R. Crim. P. 16(a)(2) (Rules of Criminal Procedure do not authorize discovery or inspection of statements of government witnesses except as provided in 18 U.S.C. 3500). The Jencks Act enables the government to protect the identities of confidential sources and other prospective government witnesses until they become actual witnesses at trial.

On at least two prior occasions, proposals to amend Rule 16 of the Federal Rules of Criminal Procedure to require disclosure of witness lists have been rejected after the Justice Department voiced concerns about the danger to the safety of witnesses. In 1975, Congress

rejected a proposal to amend Rule 16 to provide the defense with the names and addresses of all witnesses that the government intended to call at trial. See Dennis, *supra*, 68 Wash.U.L.Q. at 65. In opposing the provision, "Department of Justice Representatives submitted the results of a survey detailing over 700 instances of witness intimidation, assault or assassination." *Ibid.* (citing *Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 92 (1975) (statement of John C. Keeney, Acting Assistant Attorney General, Criminal Division, Department of Justice)). Congress explained the rejection of the provision as follows:

> A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 12 (1975).

More recently, the Advisory Committee on Federal Rules of Criminal Procedure again submitted a proposal to require the government to produce the names and statements of its witnesses before trial. The Justice Department was opposed to the provision. The Judicial Conference of the United States ultimately rejected it. Compare 156 F.R.D. 460, 460-482 (1994) (proposed amendment) with 167 F.R.D. 221, 221-227 (1996) (Court-approved amendment); *id.* at 223 n* ("At its September 19-20, 1995 session the Judicial Confer-

ence did not approve the proposed amendments to Criminal Rule 16.").[4]

This Court's cases have recognized the legitimacy of the government's interest in protecting, until the time of trial, the identity of confidential informants and other prospective witnesses. In *Weatherford*, the Court held that neither *Brady* nor the Due Process Clause requires the government to disclose a list of its witnesses in advance of trial. 429 U.S. at 559. The Court also recognized in *Weatherford* the "necessity of undercover work and the value it often is to effective law enforcement," as well as "the desirability and legality of continued secrecy even after arrest." *Id.* at 557. In *Roviaro* v. *United States*, 353 U.S. 53, 59, 62 (1957), the Court recognized a qualified privilege to withhold the identify of informants even at trial. The Ninth Circuit's ruling fails to accommodate those important law enforcement interests.

2. The Ninth Circuit's rule also permits a criminal defendant to use the guilty plea process as a discovery device to assist in his preparation for trial, in conflict with the principles established in this Court's *Brady* decisions. Under this Court's *Brady* decisions, defendants have a right to use *Brady* information at trial; they do not have a right to use *Brady* as a discovery

[4] The problem of witness intimidation does not mean that the government never provides witness lists before trial. In appropriate cases, the government has done so. See H.R. Rep. No. 247, 94th Cong., 1st. Sess. 13-14 (1975) (discussing practices followed by some U.S. Attorneys in disclosing witness lists, in considering later-rejected proposal to amend Rule 16 to require such disclosure). But a constitutional rule that would *mandate* such disclosure as a prerequisite to a valid guilty plea would eliminate the government's power to protect witnesses when there is a reason to do so.

device to assist in their trial preparation. *Agurs*, 427 U.S. at 112 n.20; see *Weatherford*, 429 U.S. at 557. Accordingly, as the courts of appeals have uniformly held, *Brady* does not require the government to provide a defendant with immediate access to *Brady* material. Instead, the government satisfies its *Brady* obligations as long as it provides *Brady* information to the defendant in time for its effective use at trial. *United States* v. *O'Keefe*, 128 F.3d 885, 989-899 (5th Cir. 1997), cert. denied, 523 U.S. 1078 (1998); *United States* v. *Valencia-Lucena*, 925 F.2d 506, 514 (1st Cir. 1991); *United States* v. *Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988); *United States* v. *Presser*, 844 F.2d 1275, 1285 (6th Cir. 1988); *United States* v. *Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 & n.6 (4th Cir.), cert. denied, 474 U.S. 1005 (1985) ; *United States* v. *Higgs*, 713 F.2d 39, 44 (3d Cir. 1983), cert. denied, 464 U.S. 1048 (1984).

The Ninth Circuit's rule provides a ready mechanism for defendants to advance the time for disclosure, transforming *Brady* from a fair trial right to a trial preparation right. In particular, defendants can be expected to demand immediate access to information on the ground that they are considering whether to plead guilty, and then use the information for trial preparation instead.

3. The Ninth Circuit's ruling also significantly hampers the expeditious resolution of criminal cases through guilty pleas. If the prosecution must routinely disclose *Brady* information (including witness impeachment information under *Giglio*) to every defendant before he pleads guilty, the time and resources devoted to guilty pleas would have to be substantially increased. Under existing federal practice, the trial preparation that is required to uncover such information, particularly information that might impeach government witnesses, does not even begin until it is clear that a

defendant intends to contest his guilt at trial. The problem that is posed by the Ninth Circuit's rule is especially acute because *Brady* requires prosecutors to search the files of all members of the prosecution team —including allied investigative entities—for potentially exculpatory information. *Kyles*, 514 U.S. at 437.

In order to comply with the Ninth Circuit's decision, prosecutors would be required at the guilty plea stage to engage in "the often time-consuming process of determining which witnesses [they] may call at trial, what potential impeachment information on each witness is in [their] possession, and whether [they] must disclose that information to the defendant." Pet. App. 39a (Tallman, J., dissenting). Moreover, in order to decide what information to disclose, prosecutors would have to engage in a highly speculative inquiry into whether particular information would be reasonably likely to lead the defendant to go to trial rather than to plead guilty. That time-consuming and resource-intensive process would destroy a significant part of the value to the government that plea bargaining now affords. See *Brady* v. *United States*, 397 U.S. at 752 (a government interest supporting plea bargaining is that scarce judicial and prosecutorial resources are conserved for other cases).

4. The court of appeals' decision also intrudes on the interest in the finality of guilty pleas. It enables a defendant to attack his plea long after he has solemnly admitted his crime in open court. The essence of a defendant's due process claim at that point is not that his solemn admissions of guilt were false. Instead, the claim is that, if the government had disclosed a particular piece of evidence, the defendant would have recalculated the risks and benefits of his options and insisted

on going to trial rather than pleading guilty. Pet. App. 15a.

As this Court has recognized, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). "The impact is greatest," the Court has emphasized, "when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas." *Ibid.*; *Bousley*, 523 U.S. at 621 ("the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas") (internal quotation marks omitted). An intrusion on finality is particularly problematic when there is no claim that "unfair procedures may have resulted in the conviction of an innocent defendant" (*Timmreck*, 441 U.S. at 784)—the situation that exists when a defendant has admitted his guilt in open court.

5. The Ninth Circuit's rule also deters the government from offering plea bargains that could benefit both the defendant and the government. *Blackledge*, 431 U.S. at 71 (noting that plea bargains can "benefit all concerned"); *Brady*, 397 U.S. at 752 (noting the "mutuality of advantage" that characterizes guilty pleas). When the government uses confidential informants or undercover agents to conduct an investigation into a large-scale conspiracy, it will be reluctant to disclose information that would jeopardize the investigation or the safety of those involved in it. If entering into a plea agreement with a defendant would require the government to disclose such information, the government will likely refrain from entering into the agreement. Similarly, if the government must essentially complete its

trial preparation to comply with its disclosure obligations at the plea agreement stage, the government may decide that it is no longer advantageous to the government to offer such an agreement rather than proceed to trial. Because most defendants benefit from plea bargains, the Ninth Circuit's rule has the perverse consequence of harming the very class of persons its rule seeks to protect.

Broader harms to law enforcement are also threatened by the Ninth Circuit's rule, because the rule would impair the government's flexibility in seeking cooperation from defendants. The government depends on the concessions it gives in plea agreements to induce less culpable defendants to cooperate in investigations and prosecutions so that it can obtain convictions of more culpable defendants. See *United States* v. *Mezzanatto*, 513 U.S. 196, 207-208 (1995) (prosecutors extend "leniency in sentencing" for suspects with information to offer, because "prosecutors often need help from the small fish in a conspiracy in order to catch the big ones"); *United States* v. *Singleton*, 165 F.3d 1297, 1301 (10th Cir.) (en banc) ("[n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence"), cert. denied, 527 U.S. 1024 (1999). See 18 U.S.C. 3553(e); Sentencing Guidelines § 5K1.1. Where the Ninth Circuit's disclosure rule would deter the government from entering into plea agreements because of the need to protect ongoing investigations, it would preclude negotiations for cooperation. That result will hamper the government in prosecuting violators who are most culpable.

In sum, the Ninth Circuit's disclosure rule is not only unnecessary to ensure the fairness or accuracy of a guilty plea; it also imposes serious costs on the criminal justice system and threatens to disadvantage defendants who are denied favorable plea agreements. The Due Process Clause does not require the imposition of that rule.

II. A CRIMINAL DEFENDANT MAY VALIDLY WAIVE ANY RIGHT HE MAY HAVE TO OBTAIN MATERIAL EXCULPATORY INFORMATION BEFORE PLEADING GUILTY

Even assuming that the principles of *Brady* v. *Maryland* were extended to confer on a defendant the right to obtain material exculpatory information from the government before pleading guilty—and no such extension is warranted—there is no reason why a defendant could not validly waive that right in a plea agreement. Under this Court's decisions, that right, like most other constitutional rights, would be subject to waiver. As this Court explained in *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." In particular, under this Court's cases, a defendant may waive the right to a double jeopardy defense, *Ricketts* v. *Adamson*, 483 U.S. 1, 10 (1987), the privilege against compulsory self-incrimination, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969), the right to a jury trial, *ibid.*, the right to confront one's accusers, *ibid*, and the right to counsel, *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938).

There is nothing inherent in the right to obtain *Brady* information that would distinguish it from those other rights. If a defendant assisted by competent

counsel decides to plead guilty and is willing to waive his right to obtain whatever material exculpatory information there happens to be in exchange for the possibility of a reduced sentence or other considerations, no sound basis exists to prevent him from doing so.

That is particularly true with respect to the subset of information relating not to substantive evidence of guilt, but to the impeachment of government witnesses. The entire point of receiving impeachment evidence is to assist in the cross-examination of witnesses. If a defendant may validly waive his right to cross-examine witnesses altogether, which the plea of guilty itself accomplishes, *Boykin*, 395 U.S. at 243, he should also be able to waive access to one category of information that may have been useful in conducting such cross-examinations.

This Court in *Mezzanatto* noted that "[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts." 513 U.S. at 203-204 (internal quotation marks omitted). But the receipt of *Brady* information at the guilty plea stage does not fall within that narrow category. To the contrary, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna*, 423 U.S. at 62 n.2 (emphasis deleted).

* * * * *

The Ninth Circuit accordingly erred in holding that respondent may challenge the government's refusal to recommend a downward departure at sentencing. Respondent's challenge is premised on the theory that

the government was retaliating against her rejection of a plea agreement containing an "unconstitutional waiver of her *Brady* rights." Pet. App. 3a. Because respondent had no *Brady* rights to waive at the plea-agreement stage and because such a waiver would in any event be valid, the proposed plea agreement was constitutional. The government's opposition to a "fast track" departure therefore provides no basis for vacating respondent's sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Rule 11 of the Federal Rules of Criminal Procedure provides in relevant part:

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or

supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self- incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in

open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

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(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

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2. Rule 16 of the Federal Rules of Criminal Procedure provides in relevant part:

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and re-

corded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the

government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other

internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

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3. The Jencks Act, 18 U.S.C. 3500, provides in relevant part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

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